No. 81946-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JIM A. TOBIN,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Petitioner.

MEMORANDUM OF AMICI CURIAE ASSOCIATION OF WASHINGTON BUSINESS WASHINGTON SELF-INSURERS ASSOCIATION SUPPORTING PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Miscellaneous Authorities

I. INTRODUCTION

The Court of Appeals, in a published decision, has held the Department of Labor & Industries' ("L&I") right to reimbursement from the third party tort settlement of a workers' compensation claimant does not include that portion of the settlement characterized as an award for "pain and suffering". *Tobin v. Dept. of Labor & Indus.*, ___ Wn. App. ___, ___, 187 P.3d 780 (Jul. 1, 2008). This holding is despite RCW 50.24.060(1), which creates a right of reimbursement from an injured worker's "recovery," and despite RCW 50.24.030(5), which defines "recovery" as "*all damages* except loss of consortium" (emphasis added).

Rather, the Court of Appeals holding is based on this court's rationale in *Flanigan v. Dept. of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994), that "recovery" did not encompass a loss of consortium award because L&I does not pay benefits for loss of consortium. But RCW 50.24.030(5) was added after, and specifically in response to, *Flanigan*. Thus the Court of Appeals failed to apply the plain language of RCW 50.24.030(5) and refused to consider the clear record of legislative intent underscoring its purpose. Remarkably, in a secondary holding, the Court of Appeals found RCW 50.24.060 unconstitutional on due process grounds.

These significant legal errors amount to a judicial rewrite of the deliberately crafted statutory scheme for disbursing third party tort recovery in the workers' compensation system. The Court of Appeals' decision has significant policy implications for the system, and detrimental cost and competitiveness implications for Washington state fund and self-insured employers. Amici therefore urge review under RAP 13.4(b)(4).[1]

II. IDENTITY AND INTEREST OF AMICI CURIAE

A. The Association of Washington Business

The Association of Washington Business ("AWB") is the state's largest general business membership organization and represents over 6,500 businesses from every industry sector and geographical region of the state. AWB member businesses range from large to small and collectively employ over 650,000 people in Washington. AWB is an umbrella organization which also represents over 100 local and regional chambers of commerce and professional associations. AWB frequently appears in this and other courts as amicus curiae on issues of substantial

[1] Amici do not herein discuss grounds for review under RAP 13.4(b)(1), (2), or (3) but agree with L&I that the Court of Appeals' specious invalidation of RCW 51.24.060 on constitutional grounds merits review under all three criteria. It presents a constitutional question and conflicts with decisions of this court and other divisions that have upheld the statute. *Pet. for Rev.* at 19. Furthermore, the holding is not, as respondent claims, unreviewable dicta. *Resp't's Ans. to Pet. for Rev.* at 16. "Dicta does not work that way, and a case may have more than one holding." *Washington State Farm Bureau Federation v. Gregoire*, 162 Wn.2d 284, 319 n. 2, 174 P.3d 1142 (2007) (Chambers, J., concurring).

interest to its statewide membership. AWB members are covered under the state's workers' compensation laws, either as employers who obtain industrial insurance through the state fund or who self-insure. Judicial interpretation and application of the laws related to workers' compensation, especially when they impact the costs of industrial insurance coverage, are of fundamental interest to these employers.

B. The Washington Self-Insurers Association

The Washington Self-Insurers Association ("WSIA") is a non-profit business association formed in 1972 to represent the interests of members who self-insure for workers compensation in Washington State. Today, the WSIA has 385 members to whom it provides a variety of educational, training, business assistance, and governmental relations services with respect to workers' compensation law and regulation, workplace safety, and accident prevention. Self-insured employers pay workers' compensation benefits directly from their general assets and pay an administrative assessment to the Department of Labor & Industries. They operate under the same laws and rules that apply to the state fund. Accordingly, judicial treatment of the Department's right of reimbursement from the third party tort recovery of an injured worker applies with equal force to the same right of self-insured employers.

III. ISSUES OF CONCERN TO AMICI CURIAE

Is the pain and suffering portion of an injured worker's recovery from a third party tortfeasor subject to distribution under RCW 51.24.060(1)? *Cf. Pet. for Review* at 3 (Issue A).

Does application of RCW 51.24.060(1) and RCW 51.24.030(5) to damages for pain and suffering violate procedural due process? *Cf. Pet. for Review* at 3 (Issue B).

IV. STATEMENT OF THE CASE[2]

V. REASONS TO ACCEPT REVIEW

A. THE COURT OF APPEALS DECISION SUBVERTS THE PURPOSE OF REIMBURSEMENT FROM THIRD PARTY RECOVERY.

In its petition, L&I touches upon, and this court has from time to time articulated, the public policy underlying the statutory right to reimbursement from an injured worker's recovery from a third party tortfeasor. That purpose is two-fold: to prevent unjust enrichment through double recovery for the same accident and to protect the workers' compensation state fund by ensuring the accident and medical funds are not charged for damages caused by third parties. *Maxey v. Dept. of Labor & Indus.*, 114 Wn.2d 542, 549, 789 P.2d 75 (1990); *Clark v. Pacificorp*,

[2] For brevity's sake, AWB adopts, as if set forth herein, the Statement of the Case provided by L&I in its *Petition for Review* at pages 3-9.

118 Wn.2d 167, 184, 822 P.2d 162 (1991); *Washington Ins. Guar. Ass'n v. Dept. of Labor & Indus.*, 122 Wn.2d 527, 531, 859 P.2d 592 (1993). These policies apply equally to self-insured employers. RCW 51.24.060; *Mandery v. Costco Wholesale Corp.,* 126 Wn. App. 851, 110 P.3d 788, 791 (2005); *Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 693, 112 P.3d 552 (2005). This purpose is accomplished through a deliberately balanced statutory distribution scheme:

> Inherent in RCW 51.24, is the legislative intent that industrial insurers should not bear the cost of industrial accidents caused by third parties. This is the essence of the quid pro quo compromise: the employer provides sure and certain relief in the form of strict liability in exchange for limitations on that liability and immunity from suit by workers and their beneficiaries. This objective of limited liability to the employer is frustrated if the employer is forced to bear the cost of accidents caused by third parties. In such a case, the injured worker achieves a full recovery at the expense of the industrial insurer and the industrial insurance fund, despite the fact that the third party was liable. In order to avoid this consequence, the Legislature provided that the Department may reimburse the industrial insurance fund with the proceeds of third party actions under the Act. This intent is apparent in the history of third party recovery under the Act.

Flanigan, 123 Wn.2d at 433 (Madsen, J., dissenting). This intent is furthered by guaranteeing an injured worker 25 percent of a tort recovery after distribution of attorneys fees and costs, thereby incentivizing the worker to pursue the third party claim. RCW 51.24.060(1)(b).

The Court of Appeals decision thoroughly frustrates these legislative purposes. L&I's petition graphically demonstrates the extent

that Tobin's recovery under the Court of Appeals' rationale makes him more than whole, *Pet. for Rev.* at 11-12, and the fact this double recovery ends up being underwritten by Tobin's employer and employers generally through workers' comp taxes, *id.* at 14-15. L&I also points out that applying the Court of Appeals' rationale, the state funds are responsible in Tobin's case for $260,000 more in benefits than compared to a plain language application of RCW 51.24.060 and RCW 51.24.030(5). *Id.* at 13. Multiplied across thousands of third party claims litigated or settled each year, this has the potential to divert millions of dollars from the state fund by undermining the legislative purpose to replenish the funds for benefits paid at the expense of third party tortfeasors.

Moreover, the Court of Appeals' holding creates a moral hazard by encouraging the designation of third party settlements as "pain and suffering" awards to minimize the amount of money paid back to the state fund or self-insured employer. Even ethical claimants' counsel will have a duty as a zealous advocate to play this game of "keep away" from L&I by characterizing otherwise undesignated tort recoveries as "pain and suffering" awards – an inherently subjective, indefinable (and therefore highly manipulable) category of recovery.

Finally, these are not merely ongoing or prospective problems. The ink was still wet when *Tobin* spawned at least one class action lawsuit

against L&I for recovery of funds reimbursed under its straightforward, pre-*Tobin* (and post-*Flanigan*) application of RCW 51.24.060. *See Davis v. Dept. of Labor & Indus.*, No. 08-2-01647-9 (Thurston County. Sup. Ct., filed Jul. 11, 2008) (*Pet. for Rev.* at App. E). The state fund's (and self-insured employer's) potential past exposure to follow-on class litigation after *Tobin*, should the erroneous decision stand, is enormous and unjust.

The federal courts, in analogous Longshoremen's Act cases, have rejected *precisely* the holding the Court of Appeals made here because it "completely misconceives the purpose and function of the Act; the whole theory of the Act, and of similar compensation legislation, is to provide the injured workman with certain and absolute benefits in lieu of all common law damages." *Haynes v. Rederi A/S Alladin*, 362 F.2d 345, 350 (5th Cir. 1966) (criticizing as "patently unsound" and "so bizarre and unsupportable as to require very little rebuttal" claimant's contention that pain and suffering portion of settlement award should be excluded from reimbursement to employer's insurer). This court should grant review and reverse the Court of Appeals' misconception of the purpose of workers' compensation generally and third party reimbursement specifically.

B. THE COURT OF APPEALS DECISION ADVERSELY AFFECTS THE COST AND COMPETITIVENESS OF WASHINGTON EMPLOYERS CONTRARY TO LEGISLATIVE INTENT.

The state fund and self-insured employer community cares about the system because they are the principal funders of it. Employers pay either into the state fund through a payroll tax calculated on the basis of risk classification and claims experience[3] or directly out of their general assets if self-insured.[4] Employees also pay into the system amounting to about 25 percent of the total premium in a given year.[5]

Washington's workers' compensation system is among the most generous,[6] and therefore most expensive,[7] industrial insurance systems in the nation. Workers' compensation taxes are among a Washington employer's largest individual items of overhead, and policies that affect the cost of the system are therefore a fundamental economic concern and

[3] RCW 51.16.035.
[4] RCW 51.14.010(2); .020(1). Self-insured employers also pay an annual administrative assessment to L&I. RCW 51.44.150.
[5] Employees pay premiums through a payroll deduction for the medical aid fund, RCW 51.16.140, and the supplemental pension fund, RCW 51.32.073. At the same time, many employers pay the employee portion of premium as a fringe benefit, either voluntarily or through collective bargaining.
[6] Washington pays the third highest total benefits in the nation. *See* Washington Alliance for a Competitive Economy (WashACE), *2009 Competitiveness Redbook: Key Indicators of Washington State's Business Climate* Table 25 (2008).
[7] Washington Alliance for a Competitive Economy, *Competitiveness Brief: Workers' Compensation 2006* at 1 (2006), available at http://researchcouncil.blogs.com/weblog/files/washace_cb_0606.pdf.

affect the ability of Washington employers to compete in a global marketplace.

Costs matter deeply in workers' compensation, and benefit costs are by and large taxed directly to (or paid directly by) individual employers. When a third party recovery results in reimbursement to the state fund or employer, the statute achieves a significant cost savings. A self-insured employer is simply reimbursed for costs it should not have expended, while a state fund employer's experience rating (which forms part of the basis of its premium tax) is retrospectively adjusted on the basis of the money reimbursed.[8] To the extent *Tobin* has comprehensively weakened this reimbursement system by removing a potentially sizeable element of third party tort recovery the Legislature never meant to remove, it is a matter of substantial public interest.

C. THE COURT OF APPEALS DECISION NEGLECTS THE PLAIN MEANING OF RCW 51.24.030(5) AND A CLEAR RECORD OF LEGISLATIVE INTENT TO ADDRESS *FLANIGAN*.

It should be clear that Laws of 1995, ch. 199 § 2 (Senate Bill 5399) amended RCW 51.24.030 specifically to address *Flanigan*, which was published in the concluding days of the prior legislative session in 1994. *Flanigan* held L&I may not reimburse itself out of a recovery for loss of

[8] WAC 296-17-870(4).

consortium. And so SB 5399, an agency request bill from L&I, added subsection (5) to RCW 51.24.030 to read "[f]or the purposes of this chapter, "recovery" includes all damages except loss of consortium." In this sense, Senate Bill 5399 both codified and limited *Flanigan*.

Inexplicably, the Court of Appeals disagreed with that fairly straightforward purpose and both brushed aside a compelling record of legislative history *and* rewrote the statute. The legislative history surrounding the enactment of SB 5399, appended in part to the petition at appendix C, includes illuminating remarks from L&I – the agency that requested the bill -- and from a representative of the Washington State Trial Lawyers Association ("WSTLA") as to the intent behind the bill.[9] This purpose was evidently accepted as the bill sailed through both chambers' policy committees and floor calendars with no material amendments and only a few dissenting votes on final passage. *See* Final Bill Report on SB 5399, 54th Leg., Reg. Sess., at 2 (Wash. 1995).

But in a certain sense, the legislative history is a sideshow because the statutory text is clear. "Recovery includes all damages except loss of consortium." It makes no distinction (as in *Flanigan* and *Tobin*) between

[9] Indeed, WSTLA, the major institutional representative of the workers' compensation claimants bar and powerful system stakeholder, characterized the bill in hearing as "conceding very substantial general damages the Department and the self-insured do not pay for. . . . that's a very significant concession on our part." *Pet. for Rev.* App. C (Verbatim Report of Proceedings, March 22, 1995) at 48.

economic and non-economic damages other than with respect to loss of consortium. It makes no distinction about the nature of damages at all except for loss of consortium. It speaks plainly to the amount of recovery: "*all damages* except loss of consortium". If the plain language of the statute isn't conclusive, then the maxim *inclusio unius est exclusio alterius* applies: by putting loss of consortium in the exception clause to RCW 51.24.030(5) meant *only* loss of consortium is excepted.

Against the plain language of the provision, the Court of Appeals rewrote .030(5) to read (in common bill drafting format to show changes): ". . . 'recovery' includes all damages except ~~loss of consortium~~ damages for which the Department or self-insured employer does not pay corresponding benefits." This rewrite is contrary to the intent of the Legislature, the purpose of the system, and the "significant concession" of the claimants' bar during legislative negotiations over the section.

Often,[10] such judicial tweaking of workers' compensation statutes comes fraught with unintended consequences. It frequently provokes what

[10] *See, e.g., Dept. of Labor & Indus. v. Avundes*, 140 Wn.2d 282, 996 P.2d 593 (2000) (holding seasonal farm laborer's employment not intermittent for purposes of wage calculation given worker's intent to seek full time employment); *Fred Meyer, Inc. v. Shearer*, 102 Wn. App. 336, 8 P.3d 310 (2000) (holding wage calculation based on varying rates of pay rather than gross wages); *Cockle, supra*, (holding "wages" for purposes of benefit calculation includes certain fringe benefits such as health insurance); *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 177 P.3d 692 (2008) (adopting "traveling employee doctrine" for purposes of determining "course of employment" for out of state employee).

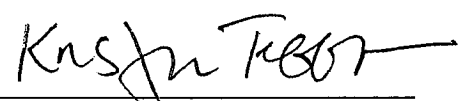
Justice Talmadge aptly called a "bitter battle in the Legislature between labor and business over the scope of [benefits]." *Cockle v. Dept. of Labor & Indus.*, 142 Wn.2d 801, 824, 16 P.3d 583 (2001) (Talmadge, J., dissenting).

That dialogue is real and ongoing. And discussion whether .030(5) should say or mean something other than what it plainly says and means should occur in within its context – in the legislative branch. The "grand compromise" of workers' compensation is a creature of statute. Its costs and benefits are properly adjusted through policy decisions of the Legislature, where representatives of L&I, labor, employers, claimants, and the people are better able to shape policy through hearings, fact-finding, debate and compromise. The proper scope of reimbursement from a third party settlement award is no different.

VI. CONCLUSION

The court should grant the petition.

Respectfully submitted this 29th day of September, 2008.



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